No. 95-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and
DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Maureen M. Devlin
BOPP, COLESON & BOSTROM
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808-8100
Telephone (812) 232-2434

February 16, 1996

Counsel for Amicus Curiae

35 pp

QUESTION DEALT WITH HEREIN

Whether the right of political parties to engage in issue advocacy is protected by the free expression and free association guarantees of the First Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS[1]

INTEREST OF AMICUS CURIAE

The National Right to Life Committee, Inc. ("NRLC") is a nonprofit corporation, recognized by the Internal Revenue Service as an organization qualified under 501(c)(4) of the Internal Revenue Code. NRLC's purpose is to promote respect for the worth and dignity of human life from conception until the time of natural death. It is a nonpartisan, nonsectarian federation of affiliate organizations from the 50 states and the District of Columbia and about 3,000 local chapters, made up of individuals from every race, creed, ethnic background, and political belief. NRLC is governed by a Board of Directors, representing the affiliate organizations. NRLC engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent, individual human life.

As a part of its advocacy of the pro-life issue, NRLC engages in constitutionally-protected issue advocacy in the political arena. A decision of the Court in this case in favor of Respondent Federal Election Commission would have far-reaching and negative implications, as described herein, for the application of election laws and regulations to NRLC and similarly-situated organizations. Therefore, NRLC seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF THE ARGUMENT

Political parties exist to advance issues, not just specific candidates. This is evident from the history of party formations, their rise and fall in public favor, their platforms, and their advocacy activities. In past decisions, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has developed a bright-line rule to

---

[1]This brief is filed with consent of the parties. Petitioners' consent form and Respondent's consent letter have been filed with the Court Clerk.

guard constitutionally-protected issue advocacy from laws regulating electioneering. Political parties need — and are constitutionally entitled to — the same bright-line protection of their issue advocacy that other organizations enjoy.

In the present case, the Tenth Circuit erred by holding that "any expenditure [by a political party] in connection with the general election campaign of a candidate," 2 U.S.C. § 441a(d)(3), is not protected issue advocacy if it "involves a clearly identified candidate and an electioneering message," even if the advertisement addressed public issues and did not expressly advocate the election or defeat of a federal candidate.

Because the Tenth Circuit adopted the FEC's position that a message that would otherwise be issue advocacy may become electioneering by employing a totality of the circumstances test, this case has broad implications. The decisions of this Court have required that such evaluations be made by examining the narrow facts related to the message itself, not by use of a broad range of contextual considerations. The totality of the circumstances approach of the FEC and the Tenth Circuit does not adequately protect free expression, as required by the First Amendment. If a totality of the circumstances test were adopted, there would be serious and negative consequences for the free expression and association activities of other entities besides political parties.

ARGUMENT

I. Political Parties Advocate Issues, Not Just Candidates.

Political parties form around issues. The fortunes of parties ebb and flow with the fall and rise of public concern about issues identified with political parties. Parties identify themselves with issues by advocating issues in their platforms and other fora. Therefore, parties do not exist for the sole purpose of electing candidates. The discussion in this section explains and documents these assertions.

A. *Parties Form Around Issues.*

Political parties are simply people organized to advance issues important to them in the political arena, and election of candidates is a means to advance these issues. Examination of the history and fortunes of American political parties reveals that they form, and survive or fail, in large part on the basis of the issues they advocate. There are, of course, other factors involved in party loyalty, such as ambition and self-interest. But, even the most ambitious politician must run on issues in order to be elected. An ideologically-compatible party is often essential to that effort. And, even the patronage-seeking party hack will not long receive the anticipated dole from a political machine out of step with the issues of the day.

Thus, out of utility or ideology, advancing issues is a central and essential part of party activity.[2] A brief historical survey reveals that this has long been the case.

1. The Federalist Party.

In the wake of the Revolutionary War, the Federalists were predisposed to define issues and solutions as national in scope. They shared a vision of a "Republic of Virtue," which would require a centralized government at least strong enough to secure order, predictability and stability. Linda K. Kerber, *The Federalist Party, in* 1 *History of U.S. Political Parties* 3, 3-4 (Arthur M. Schlesinger, Jr. ed., 1973). This party promoted the ratification of the Constitution and advanced arguments in support of national

---

[2]Indeed, to a world often offended by purely partisan activity, the advancement of parties as issue advocates may seem important as an antidote. A recent book documents that modern political parties are not political machines but coalitions around key issues. "Contemporary [political party] conventions are . . . combinations of issue and ideological movements: liberal groups representing African Americans, feminists, environmentalists, and the like in the Democratic party, and conservative groups advocating antiabortion, religious principles, and other conservative causes in the Republican party." John H. Aldrich, *Why Parties?* 291 (1995).

unity. Once the new government was in place, however, it soon became apparent that the broad Federalist ideology would not withstand the divergence of opinions on other national issues, and the party eventually faded away from the political scene.

2. The Jeffersonian-Republican Party.

The Republican Party began as "republican sentiment," led by Thomas Jefferson's opposition to Hamilton's national and foreign policies. Jefferson's presidential "platform" in the election of 1800 outlined his views on a variety of national issues, such as the preservation of power to the states, his opposition to a standing army in times of peace, his reluctance to form intimate connections with foreign governments, and his intent to keep the federal government frugal and simple. Noble E. Cunningham, Jr., *The Jeffersonian Republican Party, in* 1 *History of U.S. Political Parties* 239, 254 (Arthur M. Schlesinger, Jr. ed., 1973). Jefferson's election in 1801 (in the House of Representatives) marked the first transfer of government power from one party to another, and ushered in roughly twenty years of Republican political control. *Id.* at 258-59. As the Federalist Party weakened, leaving no real opposition to the Republicans, internal dissatisfaction with dilution of the party's firm stand on some of these Jeffersonian issues prompted a party split. *Id.* at 265-72

3. The Democratic Party.

The Democratic Party emerged in an era of economic transition in America, initially fueled by growing anti-bank sentiment as the former agrarian economy gave way to commercial capitalism. Michael F. Holt, *The Democratic Party 1828-1860, in* 1 *History of U.S. Political Parties* 497, 498-99 (Arthur M. Schlesinger, Jr. ed., 1973). The party stood for popular sovereignty and was viewed as the representative of the common man. *Id.* at 513. Unlike prior political parties, however, Democrats seemed to retain supporters on the basis of fierce party loyalty rather than issue identification, *id.* at 504, until the party's stand on government

non-intervention with regard to slavery divided the party — and the nation — along primarily geographic lines.

4. The Whig Party.

The Whig Party is in many ways the exception that proves the rule. It tried to remain issueless, but met its demise for failure to take a stand. In 1834, in reaction to Jacksonian democracy, opposing forces banded together to oppose the Democrats. They called themselves Whigs. John A. Crittenden, *Parties and Elections in the United States* 25 (1982). The party organized around the proposition that "[t]he outs might win, if they could pool their forces against the ins." *Id.* The group included those who sought energetic internal improvements in the Nation, advocates of states' rights, and people of culture who disliked Jacksonian anti-intellectualism. *Id.* However, "[t]he Whigs did not adopt a platform, and they avoided taking stands on issues in the campaign." *Id.* at 26. Only one candidate, Henry Clay, had known positions, and his opposition to the annexation of Texas misjudged public sentiment. *Id.* Most candidates nominated by the party were "nonpolitical military heroes." *Id.* This issuelessness contributed to the downfall of the party. As the slavery issue rose in public debate, the Whigs once again ran an issueless candidate, Winfield Scott, without success. *Id.* at 27. "A growing anti-slavery sentiment in the Northern wing of the party repelled the Southern Whigs, and most of them defected to the Democrats." *Id.* However, with the rise of the Republican Party (which would stand for issues), Whigs opposed to slavery (and those focused on other issues, e.g., temperance advocates and Know-Nothings) found a new home. The Whig party slid into oblivion.

5. The Republican Party.

There is perhaps no greater example which illustrates the intimate connection between political parties and issue advocacy than the history of the birth of the Republican Party. In response

to the introduction of the Kansas-Nebraska bill in 1850,[3] groups of men from a variety of political affiliations, such as the Whigs, Know-Nothings, Free-Soilers, and even Democrats, abandoned their respective parties to unite over the slavery issue, and the Republican Party "emerged as a party of reform." Andrew W. Crandall, *The Early History of the Republican Party 1854-1856* 16 (1960). As one anti-slavery meeting organizer later explained, "We went into the little meeting held in a schoolhouse Whigs, Free Soilers, and Democrats. We came out of it Republicans . . . ." William Starr Myers, *The Republican Party: A History* 44 (1931).

6. Some Minor Parties.

Numerous minor parties have appeared on the political landscape focusing on issues of the day. For example, 1892 saw the rise of the Populist Party, which "called for national ownership of railroads, a graduated income tax, an increase in the money supply, and an eight-hour day for industrial workers." John A. Crittenden, *Parties and Elections in the United States* 36 (1982). In the late 1970s, the Citizens' Party united certain fans of Ralph Nader and Barry Commoner with activists in the environmental and disarmament movements. *Id.* at 260. The Libertarian Party believes only limited state interference with personal freedoms is permissible, along the lines of the writings of John Stuart Mill. The Socialist Labor Party and the Communist Party formed around particular political philosophies. The Prohibition Party formed around the issue of prohibiting alcoholic beverages. The Liberty Party got 2.3% of the presidential vote in 1844, and was important to the abolitionist movement. *Id.* at 112-13. The American Independent Party (George Wallace) arose over the issues of race, urban unrest, and Vietnam. *Id.* at 114. The issues of other parties are self-evident from their names, such as the Anti-Mason Party and the Free-Soil Party. In sum, there is a long history of minor

[3]The Kansas-Nebraska Bill, introduced by Senator Douglas of Illinois, would have allowed the two territories to make their own decision regarding whether to permit slavery within their borders. However, under the terms of the Compromise of 1820, slavery was prohibited in this area.

parties sprouting like mushrooms then withering, as issues capture the public attention and then fall from favor.

B. *Parties Promote Issues in Platforms.*

One of the premier ways that parties identify the issues for which they stand is through the adoption and publication of party platforms. The planks in place at the last presidential election show stark contrasts between the Republican and Democrat parties on the issues of the day. For example, on the abortion issue the Democratic plank stated: "Democrats stand behind the right of every woman to choose, consistent with *Roe v. Wade*, regardless of ability to pay, and support a national law to protect that right." Congressional Quarterly, *Congressional Quarterly's Guide to U.S. Elections* 181 (3d ed. 1994). By contrast, the Republican plank read: "We believe the unborn child has a fundamental individual right to life that cannot be infringed. We therefore reaffirm our support for a human life amendment to the Constitution, and we endorse legislation to make clear that the 14th Amendment's protections apply to unborn children. We oppose using public revenues for abortion . . . ." *Id.* at 187. The Republican National Coalition for Life identifies with the Republican Party because of this plank, stating at the bottom of a "Pro-Life Pledge of Support" form it seeks to have candidates execute: "*Respect for Life* — the *difference* between Republicans and Democrats." Republican National Coalition for Life, *Pro-Life Pledge of Support* (one page pledge form; copy on file in authors' office) (emphasis in original).

The recent Republican Contract with America is another premier example of how parties promote issues, not just candidates. The Contract identified key issues with which congressional Republicans identified. The issues included a balanced budget amendment, no U.S. troops under U.N. control, a $500-per-child tax credit, social security and welfare reforms, and other issues. *See, e.g.*, Jonathon Alter, *Decoding the Contract*, Time, January 9, 1995, at 26-27.

C. *Parties Promote Issues in Advertisements, As Petitioner Did.*

Parties promote issues through expenditures on issue advocacy, such as recent advertisements promoting Democratic budget priorities over Republican. The present case represents one of many such cases, where a party made an expenditure on issue advocacy with no candidate yet of its own and none yet nominated by the other party.

D. *Party Members Abandon Their Party Over Issues.*

Another form of evidence that party members support parties on the basis of issues is the way in which party members and even candidates switch parties as issues change. This shift in loyalties has happened throughout American history. From 1928 to 1937, leading up to and flowing from the New Deal, "[t]he flow of power to the Democrats . . . constituted the most astonishing political success since Jefferson's rout of the Federalists." John A. Crittenden, *Parties and Elections in the United States* 43. It represented a massive turning away from a Republican philosophy of rugged individualism. *Id.* at 42. The most notable recent migration has been from the Democrat Party to the Republican Party. Numerous recent articles have documented the movement of party members and officeholders from one party to the other. *See, e.g.*, Jeffrey H. Birnbaum, *Honey, I Shrunk the Party*, Time, July 3, 1995, at 25. Reasons focus on issues: "[Congressional Democrats] moan that Clinton has all but abandoned them on the central issues of the day," and "the Democratic Party 'remains intolerant to variances [by individual members] from its national party message on any issue.'" *Id.*

II. Political Parties Need Bright-Line Protection of Their Issue Advocacy.

Because political parties advocate issues, not just candidates, they need the same sort of bright-line protection of their issue advocacy afforded other entities. This is mandated by the First Amendment and the prior decisions of this Court.

A. *This Court Has Established Bright-Line Protection for Issue Advocacy.*

In a series of cases, this Court has drawn a distinction between electioneering, which may be regulated, and other expressions of free speech, including issue advocacy, which enjoy full First Amendment protection.[4] In order to constitute electioneering, as distinguished from issue advocacy, this Court has adopted a bright-line test — that the communication must "in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam).

This Court has long and carefully watched over efforts to regulate political speech in order to ensure that the guarantees of the First Amendment are not denied. This is because such restrictions "limit political expression 'at the core of our electoral process and of First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Not only has the Court afforded strong constitutional protection for political speech in general — including the right to urge the election or defeat of a candidate — but it has afforded exceptionally strong constitutional protection for issue-oriented speech in particular. As a result, this Court has repeatedly given a narrowing construction to statutes regulating political speech so as to permit prohibition or restriction of only express advocacy, in order to shield the statutes from constitutional attack.

In 1948, this Court considered the case of *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948) ("*C.I.O.*"). *C.I.O.* concerned a federal statute prohibiting a corporation or labor organization from making "any expenditure

---

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

in connection with a federal election." *Id.* at 106-107 n.1. Under this provision, an indictment was returned against the C.I.O. and its president for publishing, in *The CIO News*, a statement urging all members of the C.I.O. to vote for a particular candidate for Congress in an upcoming election. *Id.* at 108. In affirming a dismissal of the indictment, this Court observed:

> If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Id. at 121.

A lengthy footnote appended to this statement set forth several passages from case law wherein the Court had declared the specially protected nature of free speech concerning public policy and political matters:

> "Free discussion of the problems of society is a cardinal principle of Americanism — a principle which all are zealous to preserve." *Pennekamp v. Florida*, 328 U.S. 331, 346 [(1946)].
>
> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 529-30 [(1945)].
>
> "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 [(1941)].

C.I.O., 335 U.S. at 121-22 n.21.

In 1976, this Court considered a successor statute to the one discussed in *C.I.O.*, The Federal Election Campaign Act of 1971, as amended in 1974. 2 U.S.C. § 431 *et seq*. This new statute was reviewed in *Buckley v. Valeo*, 424 U.S. 1. *Buckley* dealt, inter alia, with a provision which limited "'any expenditure . . . relative to a clearly identified candidate.'" *Buckley*, 424 U.S. at 41 (quoting 2 U.S.C. § 608(e)(1)). The provision placed a limit on the amount of an independent expenditure on behalf of a candidate. However, this provision was considered to be unconstitutionally vague. *Buckley*, 424 U.S. at 41. Therefore, the Court construed it with another provision of the same statute to require "'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate." *Id.* at 42.

However, as the *Buckley* Court noted, this construction merely refocused the vagueness problem. The real problem, the Court noted, is that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42.

Because of the problem described, this Court settled on the "express advocacy" test set forth in *Buckley* as marking the line of demarcation between the permitted and the forbidden. This test is constitutionally mandated because only a statute prohibiting the express advocacy of a clearly identified federal candidate has a

sufficiently bright line of distinction to make it constitutionally defensible. This Court, in *Buckley*, explained the problem with a quotation from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43.

Thus, this Court, in *Buckley*, said that

> [t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) [placing a ceiling on independent expenditures] as limited to communications that include explicit words of advocacy of election or defeat of a candidate.

Id. Without such a clear line of demarcation, then, a speaker is forced to "hedge and trim" comments made on issues of public importance for fear he will be charged with forbidden electioneering. This is too heavy a burden on First Amendment Rights to be constitutionally permitted. It is noteworthy that, even as so narrowed, the ceiling on independent expenditures at issue in *Buckley* was struck down as not justified by a sufficiently compelling interest. *Id.* at 45. Such is the strength of the First Amendment protection of free expression.

The *Buckley* Court concluded that "[t]he constitutional deficiencies" of such unclear statutory language could only be cured by reading the statute "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44. The Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

The *Buckley* Court proceeded to determine whether the statute, "even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression." *Id.* at 44. The Court determined that the government could not advance an interest in support of the statute sufficient to "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The *Buckley* Court expanded on the subject of the First Amendment's powerful protection of political speech:

> [T]he First Amendment right to "'speak one's mind . . . on all public institutions'" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 48 (citations omitted) (ellipsis in original).

The *Buckley* Court also quoted approvingly the comments of the United States Court of Appeals for the District of Columbia, which it affirmed:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as

> well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

Id. at 42 n.50 (quoting 171 U.S. App. D.C. 172, 226, 519 F.2d 821, 875 (D.C. Cir. 1975)).

This theme of the strong First Amendment protection afforded issue advocacy was adopted by the United States Court of Appeals for the Second Circuit in *FEC v. Central Long Island Tax Reform Immediately Committee* ("*CLITRIM*"), 616 F.2d 45 (2d Cir. 1980) (en banc) (per curiam). The *CLITRIM* case dealt with whether an organization's failure to report funds expended to publish and distribute a leaflet advocating lower taxes and smaller government violated two statutory provisions. The first provision required "any 'person . . . who makes contributions or independent expenditures *expressly advocating* the election or defeat of a clearly identified candidate'" in excess of one hundred dollars to file a report with the FEC. *CLITRIM*, 616 F.2d at 52 (quoting 2 U.S.C. § 434(e)) (emphasis supplied by court). The second provision required "any person who 'makes an expenditure for the purpose of financing communications *expressly advocating* the election or defeat of a clearly identified candidate' . . . through media, advertising or mailing to state whether the communication is authorized by a candidate . . . ." *Id.* (quoting 2 U.S.C. § 441d) (emphasis supplied by court).

The *CLITRIM* court noted "the broad protection to be given political expression," *id.* at 53, as indicated by the Supreme Court in *Buckley*, and observed that

> [t]he language quoted from the statutes was incorporated by Congress in the 1976 FECA amendments to conform the statute to the Supreme Court's holding in *Buckley v. Valeo* that speech not by a candidate or political committee could be regulated only to the extent that the communications "expressly advocate the election or defeat of a clearly identified candidate."

Id. (citations omitted). The court further observed that limiting the statutes to reach only express advocacy "is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution." *Id.* (citations omitted).

The *CLITRIM* court held that

> [t]he history of §§ 434(e) and 441d thus clearly establish that, contrary to the position of the FEC, the words "expressly advocating" mean[] exactly what they say. The FEC, to support its position, argues that "[t]he TRIM bulletins at issue here were not disseminated for such a limited *purpose*" as merely informing the public about the voting record of a government official. Rather the purpose was to unseat "big spenders." Thus, the FEC would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments. The position is totally meritless.

Id. (citations omitted) (emphasis in original).

In 1986, this Court again considered the constitutional protection afforded issue advocacy, in the case of *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986). In *MCFL*, the Supreme Court considered the contention of Massachusetts Citizens for Life, Inc. "that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," relying on *Buckley*. *MCFL*, 479 U.S. at 248.

The *MCFL* Court held that this rationale must be extended to restrictions on independent expenditures. *MCFL*, 479 U.S. at 249. The Court said that if a ceiling on independent expenditures, at issue in *Buckley*, had to be construed to apply only to express advocacy of the election or defeat of a clearly identified candidate (in order to eliminate the constitutional deficiencies described in *Buckley*), "this rationale requires a similar construction of the more

intrusive provision [at issue in *MCFL*] that directly regulates independent spending." *MCFL*, 479 U.S. at 249.

In sum, this Court has never recognized a compelling interest which would justify regulation of issue advocacy. Rather, it has held that the right to vigorously advocate issues is sacrosanct. Therefore, issue advocacy must be given a sufficiently wide berth to guarantee that corporations will feel free to exercise their constitutional right of free speech. *Buckley*, 424 U.S. at 78; *CLITRIM*, 616 F.2d at 54-55 (Kaufman, Chief Judge, joined by Oakes, Circuit Judge, concurring). Moreover, where government regulates near to this sacrosanct area, it must employ the bright line of demarcation between the permissible and impermissible set forth in *Buckley* and *MCFL*.

Finally, in *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. FEC v. Keefer*, 112 S. Ct. 79 (1991), the First Circuit struck down the Federal Election Commission's regulations of voter guides which constituted issue advocacy as being beyond the authority of the FEC under 2 U.S.C. § 441b as interpreted by this Court in *MCFL*. The regulation at issue, 11 C.F.R. § 114.4(b)(5), required that a voter guide be "nonpartisan," which the FEC defined by six factors which may be considered in determining whether a voter guide is nonpartisan. The factors included consideration of whether a question is worded in a way that supports the position of a candidate on the issue covered and whether an editorial position on the survey questions, or an expression of support for or opposition to any candidate, is included in the voter guide. 11 C.F.R. § 114.4(b)(5)(i)(A)-(F).

The United States District Court for the District of Maine struck the regulations down for trespassing upon constitutionally-protected issue advocacy and for reaching beyond the authority of the Federal Election Commission. *Faucher*, 743 F. Supp. 64 (D. Me. 1990). The First Circuit affirmed the decision of the District Court. *Faucher*, 928 F.2d 468, declaring that "[t]he first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech." *Id.*

In sum, issue advocacy is constitutionally protected and no governmental interest has yet been found sufficiently compelling to permit infringement of this highly-protected free expression.

B. *There Is No Justification for Denying Bright-Line Protection to Issue Advocacy by Political Parties.*

Political parties need bright-line protection of their issue advocacy. According to the FEC, political parties — which exist in large part to advance identified political issues — should have less protection of their issue advocacy than corporations, unions, and banks.[5] However, political parties need the same bright-line protection for their issue advocacy other entities enjoy. Parties form and continue around identified issues. Parties seek to advance these issues by direct expenditures for communications, such as the advertisements at issue herein, not just by nominating and supporting ideologically compatible candidates. This issue advocacy is protected by the rights to free expression and free association guaranteed by the First Amendment. There is no justification for denying bright-line protection to issue advocacy by political parties.

Despite the facts that political parties need bright-line protection of their issue advocacy and that this Court has consistently protected issue advocacy, under the First Amendment, by employing the bright-line, express-advocacy test, the FEC insists that this should not apply to political parties. The FEC attempts to justify this notion principally on two bases: (1) the Colorado Party's[6] expenditure was really a contribution (allegedly subject to lesser protection) and (2) political parties pose sufficient danger of quid

---

[5] 2 U.S.C. § 441b, as construed by this Court in *MCFL*, 479 U.S. 238, permits banks, corporations, and labor organizations to engage in issue advocacy without restriction, even in the political context, provided they do not expressly advocate the election or defeat of a clearly identified candidate for federal office.

[6] Your amicus will follow the convention employed by Petitioners in their *Petition for a Writ of Certiorari* of referring to Petitioners collectively as the "Colorado Party."

pro quo corruption that their issue advocacy may be restrained. As shall be shown, these asserted justifications are inadequate.

1. Contribution v. Expenditure.

Did the financial transaction by the Colorado Party in this case constitute a contribution or an expenditure, and does it matter? The statutory provision at issue herein states that:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any *expenditure* in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds [various amounts].

2 U.S.C. § 441a(d) (3) (Federal Election Campaign Act) (emphasis added). Despite the facts that the statute by its terms regulates *expenditures* and the Colorado Party clearly made an expenditure for the advertisement it ran, the FEC insists that the expenditure is really a *contribution*. This is so, according to the FEC, because the FEC treats all expenditures by a party as coordinated expenditures with a party's candidate (even if there is no candidate at the time, as in the case at bar), so that they become contributions to the candidate, not expenditures.

Of course, the reason why the FEC wants these expenditures to be contributions is that, in the FEC's view, this Court in *Buckley* gave the FEC greater latitude to regulate contributions than expenditures.[7] Did it?

In *Buckley*, this Court did make some distinctions between contributions and expenditures. However, there were also some important commonalities for constitutional analysis.

---

[7]There is a certain bootstrap character to the argument that what would be protected issue advocacy for others is not for political parties because the FEC considers what would be expenditures by others to be a contribution for political parties.

By way of distinction, this Court in *Buckley* struck down an independent expenditure limitation on the basis that "expenditure limitations . . . contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. Also, there is justification for treating some expenditures as contributions, as this Court recognized in *Buckley* (of § 608(b)):

> In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations [on contributions] set forth in § 608(b).

Buckley, 424 U.S. at 46 n.53; *see also id.* at 24 n.25.

However, the underlying rationale shows that in the case at bar there should be no limitation on the Colorado Party's expenditures for issue advocacy. This Court expanded on its rationale for permitting a limitation on contributions in *Buckley* as follows:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but *does not in any way infringe the contributor's freedom to discuss candidates and issues*.

Id. at 22 (emphasis added). Thus, whatever else the terms "contribution" and "expenditure" mean, they do not include issue advocacy or the discussion of candidates. The FEC's interpretation of the statute at issue herein clearly infringes on the right of

the Colorado Party to discuss candidates and issues, which infringement *Buckley* forbids, even with regard to contributions.

This is also borne out by the language used to describe a "contribution" in *Buckley*:

> The Act does not define the phrase — "for the purpose of influencing" an election — that determines when a gift, loan, or advance constitutes a contribution. Other courts have given that phrase a narrow meaning to alleviate various problems in other contexts. [citations omitted] The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

Id. as 24 n.24. The reason there are "fewer problems" with the phrase "for the purpose of influencing" an election is because there is a common understanding of what constitutes a contribution — and the common understanding does not include issue advocacy. This is evident from the description used by the court of a "contribution." The *Buckley* opinion made clear that what makes a financial transaction either a "contribution" or an "expenditure" is whether — in the words of § 608(b) and similar statutes — the transaction is "for the purpose of influencing" an election or "with respect to an election," *id.* at 23-24 & n.24, and such terms were construed by this Court in *Buckley* to apply only to "explicit words of advocacy of the election or defeat of a candidate." *Id.* at 43-44, 78-79.

That the express advocacy test set out in *Buckley* was broadly applicable to other provisions regulating issue advocacy was evidenced in this Court's decision in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, and in the First Circuit's decision in *Faucher v. FEC*, 928 F.2d 468, described above.

In sum, whether or not the expenditure by the Colorado Party is properly characterized as a contribution or an expenditure, it may not constitutionally be regulated by the FEC because it was issue advocacy and criticism of an officeholder, all of which is protected expression, even for political parties.

2. Quid Pro Quo.

The other asserted justification the FEC gives for its regulation of the issue advocacy of political parties is the interest recognized as compelling in *Buckley*, namely, preventing actual or apparent corruption. *Buckley*, 424 U.S. at 53. In determining whether this interest justifies the regulation at issue herein, it is important to note the actual issue in this case. It is not about whether parties can be corrupt, or whether office holders can control or exact financial favors from parties, but whether there is the possibility of corruption in the exercise by a party of the right of free expression concerning issues and criticism of office holders from opposing parties.

The issue here, then, is whether expenditures by political parties for issue advocacy carry with them the risk of a quid pro quo exchange of "dollars for political favors." *FEC v. National Conservative Political Committee*, 470 U.S. 480, 497 (1985). In its briefing, the Colorado Party has demonstrated that modern political parties pose no threat of quid pro quo corruption to or from elected officials. Those arguments need not be repeated here. However, in the context of the present amicus curiae brief, two arguments are especially appropriate to reiterate: (1) parties are by nature voluntary and (2) candidates associate with parties on the basis of the prevailing views of the party. Because political parties form and survive on the basis of the issues they espouse, and because both candidates and party members voluntarily identify with parties on the basis of issues, there is no risk of quid pro quo exchanges resulting from expenditures by a political party for issue advocacy. As this Court said of *political action committees* in the *National Conservative Political Committee* case,

> [t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Id. at 498. If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

This Court has provided further guidance on whether the threat of corruption is posed by an organization such as a political party in the *MCFL* case. In *MCFL*, this Court considered a ban on independent expenditures ("in connection with" an election) by corporations, which was imposed by 2 U.S.C. § 441b. The Court reaffirmed the express advocacy test, but determined that an expenditure made by MCFL constituted express advocacy. *MCFL*, 479 U.S. at 248-49. Next, the *MCFL* Court evaluated whether there was any risk of corruption with regard to an MCFL-type organization which would justify such a ban on free expression. While *MCFL* considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party. In *MCFL*, this Court held that a corporation posed no threat of corruption to the political system if it (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated with it so as to have a claim to its assets or earnings . . . ensur[ing] that persons connected with the organization will have no economic disencentive for disassociating with it if they disagree with its political activity"; and (3) the corporation "was not established by a business corporation or a labor union." *Id.* at 264. While a political party fits all three of these factors, the second is especially applicable to the present discussion.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent "corruption," *id.* at 259, by "prevent[ing] an organization from using an individual's money for purposes that

the individual may not support." *Id.* at 260. "This rationale for regulation is not compelling with respect" to MCFL-type organizations because "[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.* at 260-61. "[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *Id.* at 261. "Finally, a contributor dissatisfied with how funds are used can simply stop contributing." *Id.*

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the party stands for. A contribution to a party is for the purpose of enhancing advocacy of the issues the party represents. Any individual unhappy with the use of the money may simply quite contributing and leave the party.

In sum, issue advocacy by political parties poses no threat of corruption. There is no justification for limiting the issue advocacy of political parties.

III. Failure to Provide Bright-Line Protection for Issue Advocacy by Political Parties Would Have Negative Implications for Other Groups.

The central troubling feature of this case is the FEC's refusal to heed the instruction of this court with regard to the constitutional mandate of bright-line protection for issue advocacy. While this Court clearly set out the broadly-applicable express advocacy test in *Buckley*, the FEC has since refused to apply the express advocacy test in broader contexts unless legally compelled to do so. This has led to defeats for the FEC position in the *MCFL* and *Faucher* cases, as noted above, which applied the express advocacy

test to broader areas of issue advocacy which the FEC has sought to regulate.[8]

Presently, litigation has once again been necessary to challenge new FEC rules attempting to regulate issue advocacy in voter guides, an issue already decided (against regulation) in the *Faucher* case, on the basis of this Court's decisions in *Buckley* and *MCFL*.[9]

---

[8]In fact, this intransigence led Chief Judge Kaufman of the Second Circuit to comment of the FEC, in *CLITRIM*, 616 F.2d at 53-54 (Kaufman, Chief Judge, concurring) that

> [T]he insensitivity to First Amendment values displayed by the Federal Election Commission (FEC) in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431, *et seq.* . . . Indeed , before *Buckley v. Valeo* . . . the Supreme Court had emphasized that freedom to criticize public officials and oppose or support their continuation in office constitutes the "central meaning" of the First Amendment. . . . If speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wider of the unlawful zone," . . . thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled, or sterilized. . . . The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley v. Valeo*, *supra*, imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility.

[9]On February 13, 1996, the United States District Court for the District of Maine declared the latest regulations of the FEC governing issue advocacy (11 C.F.R. § 100.22) to be "invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life*, 479 U.S. 238, and by the United States Court of Appeals for the First Circuit in *Faucher*, 928 F.2d 468, because it extends beyond issue advocacy." *Maine Right to Life Committee* (continued...)

This despite the fact that *Buckley* was decided two decades ago and consistently followed by this Court when presented with opportunities to apply the express advocacy test. Yet, in the case at bar, the issue is once again presented of whether this Court meant what it said when it held that issue advocacy is protected by the First Amendment rights of free expression and association and must have room to breathe so that speakers need not hedge and trim to avoid vague laws.

Concomitant with the FEC's desire to regulate issue advocacy is its desire to reject the formulation of this Court for what constitutes the bright line between issue advocacy and electioneering. In *Buckley*, this Court construed the statute at issue there (in order to avoid constitutional difficulties) "to apply only to expenditures for communications that in *express terms* advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44 (emphasis added). The Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing *express words* of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52 (emphasis added). It is clear from *Buckley* that a determination of whether a communication expressly advocates the election or defeat of a clearly identified candidate is to be made from the words of the communication itself.

In this case the FEC once again urges its totality of the circumstances test. This test, adopted by the Ninth Circuit in the case of *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987), looks not just at the context of a

---

[9](...continued)
v. FEC, No. 95-261-B-H, slip op. at 12 (D. Me. Feb. 13, 1996) (opinion and order granting declaratory relief). The Maine District Court struck down a definition of "[e]xpressly advocating," *id.* at 5, which "comes directly from" *Furgatch*. *Id.* at 7; *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). The *Furgatch* decision is discussed *infra*. The Maine District Court relied on the fact that, contrary to the Ninth Circuit's decision in *Furgatch*, this Court in *Buckley* and *MCFL* created a bright-line protection of issue advocacy, "even at the risk that it is used to elect or defeat a candidate." *Id.* at 10.

communication to determine if the communication is electioneering. It is important to note that the *Furgatch* test was decided in, and is rightly applicable to, a very narrow context. *Furgatch* was about disclosure provisions. The *Furgatch* court noted this "Court's directive that, where First Amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes of the Act." *Id.* at 861. The court then devoted a full page to discussing the importance of disclosure, the purposes served thereby, and the minimal burden imposed by disclosure. *Id.* at 862. Because it concluded that disclosure "serves an important Congressional policy and a very strong First Amendment interest," and because the burden imposed would be "minimally restrictive," the Ninth Circuit adopted a totality of the circumstances test. *Id.*

However, the case at bar is not about the minimal burden of a disclosure requirement. It is about a prohibition on issue advocacy, such as the Supreme Court considered and rejected with regard to a cap on independent expenditures in *Buckley*, 424 U.S. at 45-46, and with regard to a bar on independent expenditures by MCFL-type corporations. *MCFL*, 479 U.S. 238. The FEC would take a rule created by the Ninth Circuit in the context of a minimal-burden disclosure situation and apply it across the board, even in the maximum-burden situation where speech is barred. That is too heavy a burden on the vital freedoms of expression and association to be constitutional.

This totality of the circumstances test was proposed by the FEC in *Faucher* and rejected by the First Circuit. *Faucher v. FEC*, 928 F.2d 468. It has now been adopted by the Tenth Circuit in the present case. According to the Tenth Circuit, the line between issue advocacy and electioneering is not determined by express words of advocacy, but by whether a reasonable person would believe that the communication tended to "diminish" public support for an opposing (unnominated) candidate and "garner support" for one's own possible (though not yet identified) candidate. *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 10 (1995). This determination may be

made from a totality of the circumstances, not the express words of the communication itself.

The problem with this sort of test is simple: it forces issue advocates to hedge and trim lest the FEC decide, based on circumstances beyond the communication itself (including even those outside the control of the communicator), to bring an enforcement action and seek to demonstrate an intent to electioneer. The bright-line, express advocacy test was imposed by this Court on the FEC precisely to prevent the burden on First Amendment rights resulting from such vagaries. The Colorado Party briefs the flaws of this sort of test extensively, and those arguments need no further development here.

However, there is an important point which needs to be made in the context of this brief focusing on issue advocacy. That point is that abandoning the bright-line approach to protecting issue advocacy will fuel the efforts of those who want to encroach on the right to engage in issue advocacy. Abandoning the bright-line rule of *Buckley* and *MCFL* will create a principle that will be built upon to limit vigorous issue advocacy, resulting in loss of First Amendment rights and ongoing litigation. The right of free expression about issues is of such paramount importance in our republic that no encroachment upon it must be permitted. To that end, a bright-line rule is essential.

In sum, this Court should retain its bright-line, express advocacy protection for issue advocacy and evaluate communications under this test only in the context of the communication itself and its express words. The First Amendment requires no less.

CONCLUSION

For the reasons stated in this brief, your *amicus* respectfully prays this Court (1) to recognize that the First Amendment to the Constitution of the United States mandates bright-line protection for the issue advocacy of political parties and (2) to reverse the decision of the United States Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Maureen M. Devlin
BOPP, COLESON & BOSTROM
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808-8100
Telephone (812) 232-2434
Counsel for Amicus Curiae

February 16, 1996